

## PUBLIC UTILITIES COMMISSION

550 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298



January 27, 1995

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FCC MAIL ROOM

William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20036

Re: PR Docket No. 94-105

Dear Mr. Caton:

DOCKET FILE COPY ORIGINAL

Please find enclosed for filing an original plus eleven copies of the PETITION FOR CLARIFICATION WITH CORRESPONDING EXTENSION OF TIME by the People of the State of California and the Public Utilities Commission of the State of California in the above-referenced docket.

Also enclosed is an additional copy of this document. Please file-stamp this copy and return it to me in the enclosed, self-addressed, postage pre-paid envelope.

Very truly yours,

*Ellen S. LeVine*

Ellen S. LeVine  
Principal Counsel

ESL:cip

Enclosures

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
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Petition of the State of California )  
and the Public Utilities Commission )  
of the State of California to Retain )  
Regulatory Authority over Intrastate )  
Cellular Service Rates )  

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PR Docket No. 94-705

**RECEIVED**

**JAN 30 1995**

**FCC MAIL ROOM**

**PETITION FOR CLARIFICATION WITH CORRESPONDING  
EXTENSION OF TIME**

Pursuant to Sections 1.429 and 1.46 of the Rules of Practice and Procedure of the Federal Communications Commission ("FCC"), 47 C.F.R. §§ 1.429, 1.46, the People of the State of California and the Public Utilities Commission of the State of California ("California") hereby seek clarification of an Order, released January 25, 1995, by the Chief, Wireless Telecommunications Bureau (hereafter, "Order" and "Bureau Chief"). The CPUC also seeks a reasonable extension of time in which to comply with the FCC's Order upon clarification.

**BACKGROUND**

In its Order, the Bureau Chief adopted procedures governing the treatment of materials submitted in connection with state petitions to retain authority over rates charged by certain commercial mobile service providers for which California and other state commissions requested confidential treatment. California submitted certain information under seal to the FCC in

its petition which supported its findings that the cellular markets within California are not sufficiently competitive at this time to remove state regulatory oversight. The information was submitted under seal because, with one exception, that same information had been provided under seal to the CPUC in the course of its own investigation of the cellular industry, and disclosed by the CPUC to parties under protective order. The exception concerned information obtained by the CPUC from the California Attorney General ("AG") which was provided by certain cellular carriers in the course of a state investigation for antitrust violations conducted by the AG.

In its Order, the Bureau Chief has generally granted the CPUC's request to treat certain information contained in its petition as confidential, and has authorized the release of such information pursuant to a protective order. However, the Bureau Chief denied the CPUC's request with respect to two categories of information: (1) the information contained in Appendix J of the CPUC petition concerning the number of customers on specific discount plans of each cellular carrier; and (2) the information provided by the AG to the CPUC.

With respect to the first category, the Bureau Chief explained that such information is too competitively sensitive and not material to California's statutory demonstration.<sup>1</sup> With respect to the second category, the Bureau Chief stated

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1. This same information, however, was subject to disclosure under protective order to parties to the CPUC proceeding, including the cellular carriers and their competitors.

that, as a matter of procedure, the CPUC failed to submit an affidavit authenticating the information pursuant to Section 20.13 of the FCC's rules. 47 C.F.R. § 20.13. The Order, however, provided that the CPUC may refile this information under seal if it complies with Section 20.13, which information the FCC will then review to determine whether to permit its disclosure under protective order.

In addition to the above, the Bureau Chief also ruled on California's Motion to Compel the Production of Data. California filed such motion to compel Cellular Telecommunications Industry Association ("CTIA") and AirTouch to provide the source data underlying the analysis of Dr. Jerry Hausman who provided an analysis on behalf of these parties.

In the Order, the Bureau Chief dismissed California's motion, indicating, among other things, that the instant proceeding is not subject to formal discovery procedures. The Order further notes that it lacks actual custody of the underlying data supporting Hausman's analysis. The Order, however, does provide that CTIA and AirTouch must submit the underlying source data if it wishes the FCC to consider Hausman's analysis in its review of California's petition.

For the reasons set forth below, California seeks clarification of the FCC's requirements governing the CPUC's submission of data that it obtained from the AG. Upon clarification by the FCC, the CPUC seeks an extension of time within which to comply with applicable requirements. Such extension could coincide with any extension granted by the FCC

concerning the refiling of the CPUC petition for other purposes.<sup>2</sup>

I. THE FCC SHOULD CLARIFY THE PROCEDURAL REQUIREMENTS GOVERNING SUBMISSION OF AG DATA

Section 20.13 of the FCC's rules sets forth, among other things, a "non-exhaustive list of examples of the types of evidence, information, and analysis that may be considered" in reviewing a state petition to retain authority to regulate the rates of a commercial mobile service provider. 47 C.F.R. § 20.13. This non-exhaustive list may include "[s]pecific allegations of fact (supported by affidavit of person with personal knowledge) regarding anti-competitive or discriminatory practices or behavior by commercial mobile radio service providers in the state." 47 C.F.R. § 20.13 (2)(vi).

In its Order, the FCC states that if the CPUC wishes to resubmit the information that it obtained from the AG, it must provide an affidavit from a person with personal knowledge concerning any allegations of anti-competitive or discriminatory practices. The information concerns the marketing practices of certain cellular carriers and does not allege anti-competitive behavior. However, the carrier-specific data underlying Hausman's analysis on behalf of CTIA and AirTouch, if submitted, requires no similar accompanying affidavit.

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2. On January 26, 1995, the CPUC filed an Emergency Motion for Extension of Time for the reasons discussed therein.

The Order also provides that the FCC will not allow formal discovery in this proceeding.

As a practical matter, the FCC's Order precludes the CPUC from relying on the information which it obtained from the AG. This information was prepared and provided by specific cellular carriers to the AG, and is based on documents which the carriers furnished. The only ones with personal knowledge of the contents of these documents are the specific cellular carriers themselves. In order to comply with the FCC's Order, the CPUC would thus be required to obtain an affidavit from a representative of these cellular carriers. To do so would require the CPUC to subpoena such carriers and depose them. However, since the FCC has not permitted formal discovery in this proceeding, the CPUC is unable to take such action.<sup>3</sup> Accordingly, the CPUC cannot practically comply with the FCC's Order requiring an affidavit if such affidavit must be produced by the individual cellular carrier that prepared the specific document from which the information came.

The CPUC, however, is in possession of the source documents underlying the information obtained from the AG. The CPUC can attest, by affidavit, to how it acquired these documents and that such documents are true and correct copies.

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3. Even if, under state law, the CPUC possessed subpoena powers to obtain this information, as a practical matter, given the resistance of the cellular carriers to the CPUC's own investigation and their opposition to the CPUC's petition herein, it would likely take months before the carriers would agree to a deposition.

In light of the above, the CPUC thus seeks clarification of the procedural requirements under Section 20.13 of the FCC's rules governing the CPUC's resubmission of information obtained from the AG. If the FCC requires an affidavit from the cellular carrier which prepared the source document underlying the information relied upon by the CPUC, then the CPUC requests clarification why similar affidavits are not required from CTIA and AirTouch if they choose to submit the source material underlying Hausman's analysis.

II. AN EXTENSION OF TIME IS NECESSARY TO ALLOW THE  
CPUC TO COMPLY WITH THE FCC'S ORDER UPON  
CLARIFICATION

Currently, the FCC Order requires the CPUC, if it chooses to do so, to resubmit the AG data accompanied by a request for confidential treatment by Monday, January 30, 1995. This means that the CPUC must mail such data and request on Friday, January 27, 1995. Given the CPUC's receipt of the FCC's Order on Thursday, January 26, 1995, as discussed in its Emergency Motion for Extension of Time filed January 26, 1995, it is impossible for the CPUC to meet the January 30 filing date. Accordingly, upon clarification by the FCC of its Order, the CPUC requests a reasonable extension of time within which it may adequately

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comply with the procedural requirements as clarified by the FCC for the resubmission of the AG information. Such extension could reasonably coincide with any other extensions granted.

Respectfully submitted,

PETER ARTH, JR.  
EDWARD W. O'NEILL  
ELLEN S. LEVINE

By:

  
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Attorneys for the People of the  
State of California  
Public Utilities Commission  
of the State of California

January 27, 1995



CERTIFICATE OF SERVICE

I, Ellen S. LeVine, hereby certify that on this 27th day of January, 1995, a true and correct copy of the foregoing PETITION FOR CLARIFICATION WITH CORRESPONDING EXTENSION OF TIME by the People of the State of California and the Public Utilities Commission of the State of California was mailed first class, postage prepaid to all known parties of record in this proceeding.

*Ellen S. LeVine*

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Ellen S. LeVine